No. 85-1708

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

STATE OF CALIFORNIA, *et al.*,
Appellants,

VS.

CABAZON BAND OF MISSION INDIANS, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit

APPELLANTS' CLOSING BRIEF

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APPELLANTS' CLOSING BRIEF

ARGUMENT

I.

THE COMMON LAW BALANCING TEST SUPPORTS STATE AND LOCAL JURISDICTION IN THIS CASE.

A. Applicability of Balancing Test.

In our opening brief, we observed that this Court has adopted a common law balancing test in determining state jurisdiction over Indian reservations. See, *e.g., White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 145 (1980) (question requires a "particularized inquiry" into the "nature of state, federal, and tribal interests at stake"); State Br. 10-11. The appellees and amici tribes argue that the balancing test does not apply where the state asserts jurisdiction over Indians rather than non-Indians, and that the state lacks jurisdiction in such cases unless Congress expressly provides otherwise. Brief of Appellees ("Tribes Br.") 16-17; Laguna A.C. Br. 7-14; Tulalip A.C. Br. 23-29. In *Rice v. Rehner,* 463 U.S. 713 (1983), however, this Court applied the balancing test in holding that California can regulate liquor sales by licensed Indian traders to non-Indian buyers. Similarly, in *Washington v. Confederated Tribes of the Colville Reservation (Colville),* 447 U.S. 134 (1980), this Court applied the balancing test in holding that Washington State can tax on-reservation cigarette sales by tribal smokeshops to non-Indian buyers. The Court in both cases made clear that the balancing test has particular relevance where the tribal enterprise depends on non-Indian patronage, stating that principles of tribal sovereignty are not implicated in such cases. *Rice,* 436 U.S. at 721, & n. 7, quoting from *Colville,* 447 U.S. at 151, & n. 27.

Here, the tribal games solicit and depend on non-Indian patronage. Indeed, the games are successful because they are operated free of constraints applicable to non-Indian enterprises. Further, the games are operated by non-Indian professional operators who have entered into management contracts with the Tribes. JA 63-65, 81-83. In effect, non-Indian operators are conducting bingo games played by non-Indian patrons in circumvention of State law. In light of the extensive non-Indian involvement here, the balancing test is particularly appropriate in determining the jurisdictional issue.

The Tribes argue that *Rice* is distinguishable because the Court merely interpreted and applied a federal statute, 18 U.S.C. § 1161, not applicable here. Tribes Br. 11; Jicarilla A.C. Br. 7; Chehalis A.C. Br. 20; Laguna A.C. Br. 12-13. This argument ignores both the analysis and result in *Rice*. The Court in *Rice* held that the jurisdictional question depends primarily on whether federal law preempts state law. *Rice*, 463 U.S. at 718-720. According to the Court, the preemption analysis depends on the nature of the tribal "tradition;" in the absence of a sovereign tribal "tradition," the Court will attach "less weight" to tribal sovereignty in determining the preemption issue. *Id.* Employing this analysis, the Court reasoned, in Part A of its decision, that "tradition simply has not recognized a sovereign immunity or inherent authority in favor of liquor regulation by Indians," *id.* at 722, and in Part B that the federal statute, 18 U.S.C. § 1161, does not preempt—and indeed authorizes—the application of state regulatory liquor laws on Indian reservations. *Id.* at 725-735. In short, the Court, having determined that a sovereign tribal "tradition" did not exist, held that federal law does not preempt state law and indeed has the opposite effect. Since Indian tribes do not have a sovereign tradition of conducting high stakes gambling operations catering to non-Indians,[1] and since no federal statute

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[1] The Tribes argue that the tribal gambling operations are an "adaptation" of traditional Indian gambling practices, citing the declaration of an expert anthropologist. Tribes Br. 13-14. Whether or not the operations are an "adaptation"—an argument rejected by the district court, see State Br. 19 n. 10—it is clear that Indian tribes have not traditionally conducted high stakes gambling operations catering primarily to non-Indian patrons, as here. State Br. 18-19 n. 10. Indeed, the Tribes' anthropologist acknowledged that Indians traditionally gambled only for religious and ceremonial purposes, *id.*, which is consistent with the declaration of another expert anthropologist stating that Indian tribes have not traditionally engaged in the type of activity involved here. *Id.*

As we explain later, the legislative history of the Organized Crime Control Act, 18 U.S.C. § 1955, indicates that gambling regulation falls within the traditional province of state and local agencies. 116 Cong. Rec. 35294 (1950) (remarks of Sen. Allott) ("[L]ocal law enforcement officials . . . bear the primary responsibility in this area"). The situation here is similar to *Rice*, where this Court noted that "tradition simply has not recognized a sovereign immunity or inherent authority in favor of *liquor regulation* by Indians." *Rice*, 463 U.S. at 722 (emphasis added).

preempts the application of State and local gambling laws, the *Rice* analysis directly supports the application of State and local laws here.

The Tribes argue that *Colville* is distinguishable because the legal incidence of Washington State's sales tax fell on non-Indian buyers,[2] and the legal incidence of California law here falls on the Tribes. Tribes Br. 9-10. The Tribes' argument is misplaced for two reasons. First, the Court in *Colville* attached primary significance to the tribes' attempt to gain a competitive advantage over non-Indian businesses by "market[ing] and exemption" from State laws to non-Indians. *Colville*, 447 U.S. at 155. Rejecting the tribal argument that the Indian Commerce Clause preempted State law, the Court noted that although its decision will "lessen or eliminate tribal commerce with non-members, that market existed in the first place only because of a claimed exemption from these very [State] taxes." *Id.* at 157. Thus, the Court held that Indian tribes cannot gain a competitive advantage against non-Indian businesses by marketing exemptions from state law, regardless of where the incidence of state regulation falls. Second, the immediate incidence of California's gambling laws here falls directly on non-Indian professional operators who conduct the gambling operations, JA 63-64, 81-83, and thus falls on non-Indians in any event.

The Tribes also argue that *Colville* is distinguishable because the Tribes here, unlike those in *Colville*, provide "value" to non-Indians who play the games. Tribes Br. 10. The tribal product has "value," however, only because the Tribes are offering a product—high stakes bingo—that is unlawful in California and thus that non-Indian enterprises cannot similarly offer. In other words, the tribal product has "value" only in the sense that contraband has "value," because it is marketed to buyers who cannot lawfully obtain it under state law. The value of the tribal product depends

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[2] The Tribes assert that *Colville* held that "Washington's separate tobacco products tax could not be imposed, because the legal incidence of that tax fell directly on the tribal sellers." Tribes Br. 9. *Colville* specifically noted that "[t]he State did not appeal" the lower decision holding that the State tobacco products tax cannot be applied, and for that reason that "all parties agree" that the tax cannot be imposed. 447 U.S. at 139 n. 2. Thus, the tobacco products tax issue was not before the Court.

less on tribal efforts than on state laws prohibiting the product. Such "value" is not entitled to judicial cognizance.

B. Common Law Displacement.

The Tribes argue that the common law balancing test, if otherwise applicable, has been displaced or "preempted" by Public Law 280, citing this Court's decisions in *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering (Three Tribes)*, ____ U.S. ____, 90 L.Ed.2d 881, 890 (1986), and *Kennerly v. District Court*, 400 U.S. 423 (1971). Tribes Br. 17-19. In *Three Tribes*, this Court held that North Dakota could not retrocede jurisdiction over Indian reservations acquired under Public Law 280 by requiring tribes to waive sovereign immunity as a condition for access to state courts. The Court ruled that "Congress specifically considered the issue of retrocession but did not provide for disclaimers" of jurisdiction acquired under Public Law 280, and that North Dakota's attempted retrocession conflicted with the "congressional plan embodied in Pub L 280 and thus [is] . . . preempted by it." 90 L.Ed.2d at 892. In effect, the Court held that Public Law 280 specifically regulates retrocession and thus preempts all inconsistent state laws. Similarly, in *Kennerly*, the Court held that Montana had not acquired jurisdiction under Public Law 280 pursuant to specific procedures contained in the act, and therefore that Montana could not assert jurisdiction thereunder.

Public Law 280, however, does not similarly evince a congressional intent to displace state regulatory jurisdiction over Indian reservations, where such jurisdiction exists under other federal laws or under the common law balancing test. If the result were otherwise, Public Law 280 states would have less jurisdiction over Indian reservations than non-Public Law 280 states, where the latter states have jurisdiction under other federal laws or under the balancing test. This result would conflict with the purpose of Public Law 280 to broaden rather than reduce state jurisdiction over Indian reservations.[3] Thus, although Public Law 280 exclu-

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[3] The Senate report accompanying H.R. 1063, which became Public Law 280, repeated in substance the House report, and stated that:

> "This legislation . . . has two coordinate aims: First, withdrawal of Federal responsibility for Indian affairs wherever practicable; and second, termination of the subjection of Indians to Federal laws

sively defines a state's authority to acquire or retrocede jurisdiction thereunder, as held in *Kennerly* and *Three Tribes*, Public Law 280 does not exclusively define a state's authority to regulate gambling on Indian reservations. Although, as we argue later, we believe that Public Law 280 delegates such authority, it does not displace such authority as may otherwise exist.

Indeed, the Tribes' preemption argument is inconsistent with *Rice* itself. In *Rice*, this Court held that California—a Public Law 280 state—has the right to regulate liquor sales on Indian reservations. If Public Law 280 preempts state regulatory jurisdiction, California would lack authority to regulate such liquor sales except where such authority is delegated under Public Law 280 itself, a question not considered in *Rice*. Under this analysis, *Rice* would have been wrongly decided.

C. Federal Preemption.

Apart from whether Public Law 280 displaces the federal common law, the Tribes argue that other federal laws preempt State and local laws as applied here. First, they argue that "current federal Indian policies" favoring tribal economic development preempt State and local laws. Tribes Br. 22-24. These federal policies, they argue, are reflected in a presidential policy statement encouraging tribal development, an internal memorandum from the Acting Assistant Secretary of Indian Affairs relating to an unidentified legislative proposal, and a declaration submitted in this action by an official of the Bureau of Indian Affairs (BIA). *Id.* The presidential policy statement, however, does not mention gambling or bingo as a means to achieve tribal economic development. The statements by the BIA officials are insufficient to establish an authoritive, cohesive federal policy concerning the issues here. Indeed, the BIA statements are inconsistent with the testimony of a Department of Justice representative during a 1984 congressional hearing, stating among other things that Indian tribes lack the "authority or resources to police these types of activities." State Br. 26 n. 16. Unlike *Rice*, the federal government has not filed an amicus brief supporting the tribal position here. In any event, the statements cited by the Tribes lack the force of law and cannot have a preemptive effect.

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applicable to Indians as such." S. Rep. No. 699 (incorporating H.R. Rep. No. 848), 83rd Cong., 1st Sess. 3 (1953).

Second, the Tribes argue that the Secretary of the Interior maintains oversight authority by approving tribal bingo ordinances, and that the exercise of this authority preempts State and local laws. Tribes Br. 25-26. In *Rice* and *Colville*, however, the Secretary had also approved the tribal ordinances in question, *Rice*, 463 U.S. at 716; *Colville*, 447 U.S. at 144, and, since the Secretary did not otherwise regulate the matter, the Court attached little significance to such approval. Indeed, the Court in *Rice* specifically rejected the argument that secretarial approval signified a congressional intent to "occupy the field," stating that the argument was contrary to "the plain language of the statute and its legislative history." *Rice*, 463 U.S. at 734 n. 18.

More importantly, the Secretary's approval of tribal bingo ordinances is not a prerequisite for tribal operation of the games, and many games are operated without such approval. The Cabazon Tribe here, for example, although commencing its bingo operation in or around March 1983, JA 27, did not seek or obtain secretarial approval until September 16, 1986, barely a week before the Tribe filed its brief on the merits. Tribes Br. App. B-3. This scenario suggests that the Tribe was attempting to improve its position in this litigation rather than comply with a prerequisite, and in any event shows that the Secretary maintains little or no regulatory control over the games.

The Secretary's lack of regulatory control is reflected in his failure to adopt regulations governing the operation of the tribal games. He does not, for example, regulate operating personnel, the size of jackpots, the days or hours of operation, or the distribution of revenues.[4] The games are wholly unregulated, and

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[4] The Tribes note that the Secretary, under 25 U.S.C. § 81, has issued guidelines establishing conditions for his approval of tribal bingo management contracts, and that the guidelines require an FBI investigation of non-Indian management personnel. Tribes Br. 25-26, 30; San Manuel A.C. Br. 12-13. In fact, Indian tribes are free to conduct bingo games without obtaining secretarial approval of management contracts, and often do not secure such approval. The provision cited by the Tribes, 25 U.S.C. § 81, assuming that it applies to bingo operations at all, provides only that contracts involving tribal funds or lands are "null and void" without secretarial approval; that any money "paid to any person by an Indian or tribe" pursuant to an unapproved contract can be recovered in an action brought "in the name of the United States;" and that the recovered moneys shall be equally divided between the plaintiff and the

each tribe controls its own games. The tribes can hire any operating personnel, offer jackpots in any amount, commingle bingo revenues with other revenues, and use revenues for any purpose. For example, tribal revenues can be used to enrich individual tribal members rather than fund tribal programs. The Secretary's role is vastly different than in other cases where secretarial involvement has been held to preempt state laws. See *White Mountain Apache Tribe v. Bracker, supra,* 448 U.S. 136; *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324 (1983). This case, unlike those, presents a regulatory void.

In our view, federal policy here is most clearly expressed in the Organized Crime Control Act (OCCA), 18 U.S.C. § 1955, which prohibits gambling operations "in violation of the law of a State or political subdivision in which it is conducted." The

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tribe. Thus, secretarial failure to approve a management contract merely makes the contract unenforceable but does not render the games illegal. Moreover, the risk of nonenforceability falls on the non-Indian operator, not the tribe; 25 U.S.C. § 81 provides only for recovery of moneys paid "by" an Indian or tribe, not for recovery of moneys paid *to* an Indian or tribe. The manifest purpose of the provision is to protect Indian tribes from unapproved contracts, not to protect those with whom they contract. For this reason, the provision has been invoked only in cases where non-Indians sought relief against Indian tribes for breach of unapproved contracts, and the provision was invoked to deny such relief. See *A. K. Management Co. v. San Manuel Band of Mission Indians,* 789 F.2d 785 (9th Cir. 1986); *Wisconsin Winnebago Business Committee v. Koberstein,* 762 F.2d 613 (7th Cir. 1985); *Buxbom v. Naegele Outdoor Advertising Co.,* 739 F.2d 473 (9th Cir. 1984). In short, 25 U.S.C. § 81 does not require Indian tribes to obtain secretarial approval of management contracts, and the tribes have little incentive to seek such approval. Perhaps this explains why the Cabazon Tribe, although commencing its bingo operation in or around March 1983, JA 27, never sought or obtained secretarial approval during the pendancy of the operation. JA 64.

Additionally, the tribal amici briefs indicate that many tribes operate their own bingo games, rather than contracting with non-Indians for this purpose. See Oneida A.C. Br. 4 (Oneida Tribe); Chehalis A.C. Br. 9 (Leech Lake Band); Laguna A.C. Br. 3-4 (Northern Arapahoe Tribe); Laguna A.C. Br. 5 (Red Lake Band); Tulalip A.C. Br. 11 (Tulalip Tribe). Since these tribes do not have management contracts with non-Indians, the Secretary's guidelines do not apply to them in any event, since his guidelines apply only where he approves management contracts.

OCCA, on its face, prohibits tribal gambling operations in violation of state law. The Tribes argue that the OCCA does not apply, citing Ninth Circuit decisions incorporating the "civil regulatory-criminal prohibitory" distinction in the act. See *United States v. Farris*, 624 F.2d 890 (9th Cir. 1980); *Barona Group v. Duffy*, 694 F.2d 1185, 1190 (9th Cir. 1982); Tribes Br. 44-45. The more persuasive view, we believe, is found in the Sixth Circuit's recent decision in *United States v. Dakota*, 796 F.2d 186 (6th Cir. 1986), where the distinction was rejected as applied to the OCCA. Citing *Rice*, the Sixth Circuit noted that the OCCA and its legislative history contain "no indication" that the distinction applies. 796 F.2d at 188. Indeed, if the regulatory-prohibitory distinction were valid, the OCCA would be interpreted differently depending on whether it is applied on or off Indian reservations, since no serious argument can be made that the distinction applies in off-reservation cases. More importantly, whether or not the OCCA makes state gambling laws directly applicable on Indian reservations, the OCCA does not preempt state gambling laws as so applied, and expresses a general federal policy of deference to state gambling laws. As noted earlier, this Court held in *Rice* that the fundamental question is whether federal law preempts state law, not whether federal law authorizes the application of state law.[5]

The legislative history of the OCCA makes clear that the states have primary authority to regulate gambling and that federal law does not preempt state gambling laws. During the congressional debate, Senator Allott declared that:

> "The Federal Government will not attempt to preempt the field of gambling regulation under this legislation. Federal authorities will continue in their traditional role of cooperating with *local law enforcement officials who will continue to bear the primary responsibility in this area.*" 116 Cong. Rec. 35294 (1950) (remarks of Sen. Allott) (emphasis added).

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[5] The Tribes assert that California lacks standing to assert claims under the OCCA because the federal government has exclusive authority to prosecute such claims. Tribes Br. 45-46. Although we believe that California has at least limited enforcement authority under the OCCA, see State Br. 43 n. 26, the relevant point is that the OCCA establishes a federal policy in favor of the application of state gambling laws, whether or not the state has authority to prosecute such violations.

Thus, federal policy recognizes the "primary responsibility" of state and local authorities in the field of gambling regulation. Federal policy supports the application of State and local laws here, and in any case does not preempt their application.[6]

D. State Interest.

In our opening brief, we argued that the State interest is affected here in two ways. First, since the tribal games enable non-Indians to circumvent State gambling laws, the tribal games exploit and undermine California's general gambling policy. State Br. 15-16, 21. Second, since the tribal games are not regulated, they create substantial risks of organized criminal infiltration. *Id.* at 21, 25-29.

The Tribes argue that California has exaggerated the organized crime problem. They argue that bingo is a relatively harmless pasttime that is widely played. Tribes Br. 31-32; Laguna A.C. Br. 7-9. They note that California and other states authorize various forms of gambling and conduct statewide lotteries. Tribes Br. 41-42; Chehalis A.C. Br. 11, & Exh. A.

In our view, the Tribes have seriously underestimated the organized crime problem. The Commission on the Review of the

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[6] Some amici tribes argue that other federal laws provide sufficient protection of state interests on Indian reservations, principally 18 U.S.C. §§ 1152 and 1153, which make the provisions of the Assimilative Crimes Act, 18 U.S.C. § 13, applicable on Indian reservations. See, *e.g.*, *Williams v. United States*, 327 U.S. 711 (1946); *United States v. Sosseur*, 181 F.2d 873, 874 (7th Cir. 1950); Laguna A.C. Br. 28; Sandia A.C. Br. 23. Public Law 280, however, specifically provides that 18 U.S.C. §§ 1152 and 1153 do not apply in Public Law 280 states. JS App. 25. The apparent purpose of the exception is to ensure that Public Law 280 states have direct jurisdiction over Indian reservations, not simply to assimilate state laws into federal laws as applied on such reservations.

The Tribes also argue that the federal government has authority under other federal statutes to prosec e organized crime on Indian reservations, and that the federal government actually exercised this authority in *United States v. Dakota, supra*, 796 F.2d 186, and *United States v. Farris, supra*, 624 F.2d 240. Tribes Br. 30. In *Dakota* and *Farris*, the federal government, relying on the OCCA, did not prosecute organized crime, but instead sought to enjoin tribal casino operations that violated state gambling laws. Moreover, under the Tribes' view, the OCCA does not apply to tribal gambling operations in any event.

National Policy Toward Gambling has declared that "contrary to popular belief, bingo cannot be characterized as a parochial, low-stake game played by middle-aged and elderly women." State Br. 27. According to the commission, bingo "is, rather, a billion-dollar industry (much of it illegal) whose popularity permeates all aspects of American society, and the abuses of which often go undetected or unremedied." *Id.*[7] The California Attorney General's Task Force on Legalized Gambling and Organized Crime observed in 1967 that, when New York legalized bingo in 1958, "racket minded promoters inevitably infiltrated vulnerable organizations and received the lion's share of the profits," and that such abuses were eliminated only after New York adopted "stringent regulations and control." *Id.* at 28-29. Thus, unregulated bingo creates substantial organized crime risks, and to argue otherwise ignores the lessons of past experience.

To be sure, California does authorize or operate certain lotteries, specifically the State Lottery, parimutuel horse-race betting, and charitable bingo. See Cal. Govt. Code §§ 8880 *et seq.* (State Lottery Act); Cal. Bus. & Prof. Code §§ 19400-19667 (California Horse Racing Act); Cal. Pen. Code § 326.5 (charitable bingo). California, however, extensively regulates these lotteries to safeguard against organized crime risks. For example, the State Lottery Act establishes rules governing participation, disposition of revenues for educational purposes, and selection of lottery retailers. Cal. Govt. Code §§ 8880.52-8880.55, 8880-4, 8880.48. The act also establishes a lottery commission to oversee the lottery, whose members are appointed by the Governor and State Senate. *Id.* at 8880.15-8880.23. The act provides for investigation of violations and enforcement by law enforcement agencies. *Id.* at 8943-8952. Similarly, the California Horse Racing Act establishes a State agency to license horse racing operators; regulates racing hours and days; and provides for distribution of revenues. Cal. Bus. & Prof. Code §§ 19400-19667. The act specifically regulates parimutuel betting. *Id.* at §§ 19560, 19590-19598. The

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[7] The Tribes cite the commission's statement that it "perceives little difference between 'charitable bingo' and commercial bingo," Tribes Br. 40 n. 30, implying that Indian tribes should be as free to conduct commercial bingo as charities are to conduct charitable bingo. In context, however, the commission stated that *both* commercial and charitable bingo create organized crime risks, and therefore that the state should regulate *both* forms of bingo. JA 137-138.

act also provides for enforcement of the standards by law enforcement agencies. *Id.* at §§ 19660-19667. Charitable bingo is also subject to extensive regulation and control. Cal. Pen. Code § 326.5; see State Br. 24 n. 14. Charitable bingo must be conducted only by charitable organizations; the games must be operated only by members of the charitable organization; jackpots cannot exceed $250; and revenues cannot be commingled with other funds. *Id.*

The Tribes argue that their bingo operations comply with all requirements of California law except for requirements limiting size of jackpots and providing that the games must be operated by members of the charitable organization. Tribes Br. 6.[8] The main difference between tribal bingo and charitable bingo, however, is that charitable bingo is subject to state regulatory control and tribal bingo, under the Tribes' view, is not. This difference, more than the superficial similarities and differences cited by the Tribes, relates directly to the organized crime risk. A Department of Justice representative, testifying before Congress in 1984, stated that Indian tribes lack the "authority or resources to police these types of activities," and the tribes "do not have access to subpoena power or state criminal records that are just two of the many prerequisites to effective screening and auditing of a crimi-

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[8] The Tribes assert that the "average" prize awarded at the Cabazon reservation during a four-month period in 1984 was $184.89, less than the *maximum* prize authorized under State law. Tribes Br. 6, 41; JA 267. This figure is contained in an answer to interrogatories filed *after* the summary judgment motions were filed, and is undocumented and self-serving. It is not known how the Tribe calculated the figure, whether the period in question was representative, or even whether the figure represents the "average" or "mean" prize. In any event, it is irrelevant whether the Tribe's average prize is less than the maximum prize authorized under State law, since there is no necessary corrolation between the two. The figure has no relevance to the Morongo bingo operation, and the Tribes have failed to disclose the prizes awarded by that operation.

As noted in our opening brief, a State investigator has described the prizes advertised at the Cabazon bingo parlor during a random visit in 1984, and these prizes included cars, boats, and cash awards of thousands of dollars. State Br. 5 n. 2. Additionally, the Morongo games have advertised prizes of "[o]ver $2000 nightly" and "more than $5,000,000 in 1983." *Id.*

nal operation." State Br. 26 n. 16.[9] Further, Indian tribes, unlike State and local agencies, lack criminal jurisdiction over non-Indian patrons. See *Oliphant v. Suquamish Indian Tribes*, 435 U.S. 191, 208 (1978). Thus, state regulation is the main bulwark against organized criminal infiltration. Charitable bingo, unlike tribal bingo, is protected by this bulwark.

Indeed, the differences between charitable bingo and tribal bingo cited by the Tribes—involving size of jackpots and qualifications of operating personnel—relate directly to the organized crime risk. Because charitable bingo features only small jackpots, organized crime has little incentive to gain control of the games. Because charitable bingo must be operated by members of the charitable organization, organized crime has little opportunity to gain operational control. The tribal games, on the other hand, by featuring unlimited jackpots and utilizing non-tribal operating personnel, create risks of organized crime involvement not associated with charitable bingo. Indeed, the tribal games fail to meet other statutory requirements that lessen the organized crime risk, such as the requirement that state and local authorities can require revenues exceeding $5000 monthly to be used for other purposes. Cal. Pen. Code § 326.5(k)(4). Moreover, under the Tribes' view, the tribal bingo operations are legal regardless of whether or how much they comply with state law, and thus would be legal even if they failed to conform to state law in all major respects. In any event, the main difference between tribal bingo and charitable bingo is that the latter is regulated by the State and the former, under the Tribes' view, cannot be similarly regulated.

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[9] The Tribes state that on June 20, 1986—after this Court granted review—the Area Director of the BIA appointed a Cabazon security guard to exercise federal police authority over 32 Indian reservations in southern California, including the reservations involved here. Tribes Br. 31, & App. D. Since the officer was appointed pursuant to 18 U.S.C. § 3055, *id.*, which specifically relates to "suppression of liquor traffic," a question arises concerning the officer's authority over non-liquor violations. Assuming that the officer has such authority, it is doubtful that a single federal field officer with authority over 32 reservations will be able to undertake the screening and auditing procedures, among other things, that are necessary to prevent organized criminal infiltration.

E. Tribal Interest.

The main argument advanced by the Tribes and amici tribes is an economic one. They argue that bingo has enabled the tribes to obtain revenue for tribal programs and to increase employment opportunities for individual Indians. Tribes Br. 28-29; Seminole A.C. Br. 3-11; Sandia A.C. Br. 11-15; Oneida A.C. Br. 4-5; Tulalip A.C. Br. 8-16.[10] In *Colville,* however, this Court rejected an identical economic argument. The Court stated that the tribes' "primary argument is economic," and that the tribal smokeshops "generate substantial revenues for the Tribes which they expend for essential governmental services, including programs to combat severe poverty and underdevelopment at the reservations." *Colville,* 447 U.S. at 154. Still, the Court held that the tribes could not "market an exemption from state taxation to persons who would normally do their business elsewhere." *Id.* at 155. In effect, the Court held that tribal economic interests, however valid and compelling, must yield to state interests where Indian tribes market products to non-Indians in violation of state law, and where state law itself has created the market that the tribes seek to exploit. The same rationale applies here, where the Tribes attempt to market a gambling product that has value primarily because it is prohibited under California law.

The Tribes argue that the success of tribal commercial ventures depends on the tribes' ability to market products to non-Indians. Tribes Br. 12; Chehalis A.C. Br. 25. The Tribes are free, of course, to market products to non-Indians in conformity with state laws, and compete fairly with non-Indian enterprises for non-Indian patronage. Such commercial activity may not reap the phenomenal monetary rewards of tribal bingo—although it is not clear that such rewards are proportionate to the needs of individual tribes—but the tribes must recognize that unregulated bingo involving non-Indian patrons effectively exploits the state's own

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[10] The State and County attempted by written interrogatories to find out the amount of revenues generated by the bingo operations, but the Tribes refused to answer the questions on the ground that they were "irrelevant." See Response of Plaintiff Cabazon Band of Mission Indians to Interrogatories Propounded by County of Riverside and State of California, at 10 (Feb. 9, 1984). It is difficult to understand the relevance of the Tribes' economic argument if the amount of bingo revenues is "irrelevant."

gambling policy and is thus particularly offensive to legitimate state interests.

The states' concerns would be resolved in part if Congress were to enact legislation providing for federal regulation and control of the tribal games. In that event, although the tribes would still be exploiting state gambling policy, the current regulatory void would be eliminated and the organized crime threat would disappear. The Tribes thus have legislative remedies to pursue their economic interest. To date, Congress has not legislated in the matter other than enacting the OCCA, which makes state gambling laws applicable on Indian reservations. Unless Congress specifically legislates in favor of the tribal interest asserted here, the state interest in protecting the integrity of its gambling policy and in preventing organized criminal infiltration outweighs any tribal economic interests, however compelling.

II.

PUBLIC LAW 280 AUTHORIZES THE APPLICATION OF STATE AND LOCAL GAMBLING LAWS IN THIS CASE.

A. The "Civil Regulatory-Criminal Prohibitory" Distinction.

Public Law 280 provides that state "criminal" laws, and state "civil laws . . . of general application to private persons and private property," shall have the "same force and effect" in Indian country as elsewhere in the state. 18 U.S.C. § 1162, 28 U.S.C. § 1360; JS App. 23-25. State and local gambling laws here are either "criminal" laws or "civil laws . . . of general application to private persons . . . ." Therefore, Public Law 280, on its face, provides that State and local gambling laws shall have the "same force and effect" on Indian reservations as elsewhere. This conclusion, as explained in our opening brief, is supported by the legislative history of Public Law 280, which shows that Congress intended to fully extend state civil and criminal jurisdiction over Indian reservations. State Br. 37-38.

The Tribes and amici tribes argue that this Court, in *Bryan v. Itasca County*, 426 U.S. 373 (1976), distinguished between state "civil regulatory" and "criminal prohibitory" laws in determining state jurisdiction under Public Law 280. Tribes Br. 35-37; San Manuel A.C. Br. 16-30; Tulalip A.C. Br. 41-52. We believe that the Court's distinction is dictum, and that the distinction is

contrary to section 4(b) of Public Law 280, which prohibits state "regulation" of tribal property only where inconsistent with specific federal laws. State Br. 35, 36-37. Further, as explained in our opening brief, the distinction would create the anomaly that, although Public Law 280 was intended to *broaden* state jurisdiction over Indian reservations, the act would confer *less* jurisdiction than already exists under the common law balancing test. *Id.* at 35-36.

The Tribes argue that federal and state courts have often distinguished between state "civil" and "criminal" laws in other contexts, particularly in applying the Assimilative Crimes Act (ACA), 18 U.S.C. § 13, and in applying federal constitutional guarantees, such as the privilege against self-incrimination and the bar against double jeopardy. Tribes Br. 37. The ACA, however, which makes state criminal laws applicable on federal reservations, *specifically* includes only state *criminal* laws. See, *e.g., United States v. Best*, 573 F.2d 1095, 1098-1100 (9th Cir. 1978). Similarly, the constitutional guarantees relating to self-incrimination and double jeopardy *specifically* apply only in criminal proceedings. See, *e.g., United States v. Ward*, 448 U.S. 242, 248-251 (1980).[11] Obviously the Court must distinguish between "civil" and "criminal" laws where the applicable constitutional or statutory provision requires the distinction. Public Law 280, however, does not explicitly or implicitly make the distinction. Rather, Public Law 280 expressly makes both state "civil" and "criminal" laws applicable on Indian reservations, thus obviating any necessity to distinguish between civil and criminal laws.

The Tribes argue that the regulatory-prohibitory distinction, although not appearing in Public Law 280, is supported by public policy. Tribes Br. 33-35; Laguna A.C. Br. 18-24; Chehalis A.C. Br. 14; San Manuel A.C. Br. 18-24; Tulalip A.C. Br. 32-41, 59-60. The public policy, they argue, is manifested by this Court's decision in *Johnson v. Yellow Cab Co.*, 321 U.S. 323 (1944),

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[11] Also, the state court decisions cited by the Tribe involve state statutes specifically differentiating between "regulation" and "prohibition." See *City of Shreveport v. Belk*, 258 So.2d 79, 80-81 (La. 1972) (state statute authorizing political subdivisions to "regulate but not prohibit" beer sales); *Blumenthal v. City of Cheyenne*, 186 P.2d 556, 565-567 (Wyo. 1947) (state statute authorizing municipalities to "regulate" traffic); Tribes Br. 37.

where Oklahoma argued that the Assimilative Crimes Act made Oklahoma liquor laws applicable to liquor shipments to federal military reservations. Laguna A.C. Br. 18-24; Tulalip A.C. Br. 59-60. Although the Court did not decide that issue, it stated in a footnote that a "strong argument" can be made that Congress did not intend to require federal military officials to acquire state "permits" as a condition for such liquor shipments. 321 U.S. at 380 n. 8. Perhaps more direct authority for the tribal view is found in this Court's decisions in *Hancock v. Train*, 426 U.S. 167 (1976), and *Environmental Protection Agency v. California (EPA)*, 426 U.S. 200 (1976), where this Court held that the Clean Air Act and Clean Water Act do not require federal agencies to obtain state permits. In *Hancock* and *EPA*, the Court distinguished between state "substantive" laws—which were held applicable to federal agencies—and state "procedural" laws, which were held not applicable.

Distinctions between state "substantive" and "procedural" laws, or between state "regulatory" and "prohibitory" laws, perhaps might have more validity where, as in *Hancock*, *EPA* and *Yellow Cab*, the question was whether state laws apply to federal facilities that are subject to a panoply of other federal regulatory laws. Under these circumstances, the inapplicability of state law does not create a regulatory void. In *Hancock* and *EPA*, for example, federal facilities causing pollution were still subject to the regulatory provisions of the Clean Air Act and Clean Water Act. Similarly, in *Yellow Cab*, the Oklahoma military reservation was still subject to federal statutes and regulations governing shipment, distribution, and use of liquor on military reservations. To apply this distinction here, however, would create a regulatory void not existent in *Hancock*, *EPA* and *Yellow Cab*. As noted above, Congress has enacted no legislation regulating tribal bingo games, and the Secretary of the Interior does not regulate the games. Thus, unless state laws apply, the tribal games are not subject to any regulatory controls other than those that are self-imposed. The Tribes' policy argument, although arguably valid where federal facilities are involved, has little merit here.

The regulatory-prohibitory distinction, except where based on a reasonably clear expression of congressional intent, appears to be a form of federal common law, in that it is "not explicitly or clearly found in federal statutory or constitutional command." See Hart & Wechsler, THE FEDERAL COURTS AND THE FED-

ERAL SYSTEM 770 (2d ed. 1973). Although it is appropriate to adopt common law where Congress has not spoken—indeed, the common law balancing test applied in *Rice* was adopted for this reason—it is less justifiable to adopt common law distinctions in construing federal statutes, since the primary federal lawmaking power reposes in Congress rather than the courts. See *Milwaukee v. Illinois*, 451 U.S. 304, 313-314 (1981). Perhaps for this reason, this Court has recently indicated its reluctance to make such distinctions. See *Rice*, 463 U.S. at 730 n. 13, 734 n. 18 ("[I]n the absence of a context that might possibly require it, we are reluctant to make such a distinction"); compare *California v. United States*, 438 U.S. 645 (1978) (holding that Reclamation Act of 1902 requires federal agencies to acquire state water rights permits), with *EPA v. California, supra*, 426 U.S. 200 (holding that Clean Water Act does not require federal agencies to acquire state water quality permits). See also *Ferguson v. Shrupa*, 372 U.S. 726, 732 (1963) ("Nor are we able or willing to draw lines by calling a [state] law 'prohibitory' or 'regulatory' ").

The Tribes argue that the regulatory-prohibitory distinction is not "unworkable" because it simply distinguishes between state laws that "put a stop" to an activity and those that allow the activity to "go on within the bounds of prescribed rules, restrictions, and limitations." Tribes Br. 38, quoting from *Ajax v. Gregory*, 32 P.2d 560, 563 (Wash. 1934). It is often difficult, however, to determine whether a state law is intended to "stop" an activity or allow it to conditionally proceed. The conditions attached to a general prohibition may embody state policy more than the prohibition itself, just as exceptions often swallow up a general rule. Minnesota notes in its amicus brief that Minnesota's narcotics and dangerous weapons laws may be considered "civil regulatory" because they allow narcotics and dangerous weapons to be possessed and sold under prescribed conditions. Minn. A.C. Br. 18. If so, the Tribes' argument would mean that states lack jurisdiction to prohibit sales of narcotics and dangerous weapons on Indian reservations. It cannot be imagined that Congress intended such a result in enacting Public Law 280.

B. Application of the "Civil Regulatory-Criminal Prohibitory" Distinction.

The difficulties of applying the regulatory-prohibitory distinction are evident in this case. The Tribes argue that California gambling laws are "regulatory" because California authorizes

bingo for charitable purposes. Tribes Br. 37-42. The purpose of California law, however, is not simply to prefer charitable bingo over commercial bingo as a socially acceptable activity. Rather, its purpose is to prohibit gambling except where regulated and controlled by State of local authorities, because organized crime has been shown to grow where not adequately regulated by local authorities. State Br. 22-24. California policy, then, is affected not by the type of gambling activity involved, but rather by whether it is sufficiently controlled by State of local standards backed by the State's law enforcement apparatus. In short, California absolutely prohibits unregulated gambling and makes no exceptions. Thus, California gambling laws are "prohibitory" rather then "regulatory," assuming the validity of the distinction.

This Court has often held that the states have general power to define crimes and offenses in our federal system, subject to Congress' power to define crimes under federal law. See *Rochin v. California*, 342 U.S. 165, 168 (1952); *Knapp v. Schweitzer*, 357 U.S. 371, 376 (1958). Principles of federalism thus require deference to state laws defining whether gambling enterprises are criminal or not. The same principles should apply to state laws relevant to tribal gambling enterprises, assuming that such state laws are applied in a uniform and nondiscriminatory manner.

C. Applicability to Indian Tribes.

The Tribes argue that Public Law 280 does not provide for state jurisdiction over Indian tribes, as opposed to individual Indians. Tribes Br. 33-35. Nothing in Public Law 280 or its legislative history supports this limitation. Public Law 280 makes state laws broadly applicable "within . . . Indian country" and makes no exceptions for Indian tribes. JS App. 23. The Tribes' argument is inconsistent with the purpose of Public Law 280 to broaden state jurisdiction over Indian reservations. See note 3, *supra*. The argument would allow tribal commercial enterprises to operate free of constraints applicable to individual Indian enterprises, even though both may equally impair state interests or promote tribal welfare. The distinction is not supported by the language or policy of Public Law 280 and should be rejected.

D. Tribal Card Games.

Finally, the Tribes argue that Riverside County cannot apply its card parlor ordinance to the Cabazon card games. Tribes Br. 47-50. Both the common law balancing test and Public Law 280

support the application of the ordinance. Under the balancing test, the tribal activity depends on non-Indian patronage, and no federal law preempts the ordinance. Therefore, under *Rice*, the Tribe has no "vested right" to conduct the activity. *Rice*, 463 U.S. at 721, & n.7. Public Law 280, in providing for the application of the "civil laws of such State . . . that are of general application to private persons or private property," JS App. 23, clearly encompasses local ordinances. County ordinances, under both California law and the laws of other states, are part of the body of state law. See *e.g., County of Plumas v. Wheeler*, 149 Cal. 758, 87 Pac. 909 (1906); *City of San Luis Obispo v. Fitzgerald*, 126 Cal. 279, 281, 58 Pac. 699 (1899); Restatement, *Conflicts* § 2b. Moreover, the legislative history of Public Law 280 clearly indicates that the act includes local ordinances.[12] Therefore, under both the common law and the statute, the Riverside County ordinance is applicable here.

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[12] According to the congressional reports accompanying H.R. 1063, which became Public Law 280, the BIA contacted "State and *local authorities*" to determine their willingness to assume jurisdiction over Indian reservations. S. Rep. No. 699 (incorporating H.R. Rep. No. 848), 83d Cong., 1st Sess. 5 (1953) (emphasis added). Nevada was not given jurisdiction under the enactment because "authorities of some *counties* have indicated their willingness to accept jurisdiction, others opposed it, and still others stated they would accept such jurisdiction only with an accompanying Federal subsidy." *Id.* at 6 (emphasis added). Appended to the Senate report was a letter from the Assistant Secretary of the Interior stating that the BIA had consulted with "State and *local* authorities" in the affected states; that "State and *local* authorities" were agreeable to the transfer of jurisdiction; that "some of the counties" in Nevada were opposed to the transfer of jurisdiction; and that the BIA had not consulted with "State and *local* authorities" in states other than those specifically mentioned. *Id.* at 6-7 (emphasis added). Finally, the Senate report noted that the proposed transfer of jurisdiction was consistent with other pending legislation that would transfer responsibility for certain Indian health and welfare programs to a "State, *county, or municipal subdivision* . . . ." *Id.* at 4 (emphasis added). Thus, the legislative history unequivocally shows that Public Law 280 includes local ordinances.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court reverse the decision below.

Respectfully submitted,

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